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No. 86-1902

In the Supreme Court of the United States

OCTOBER TERM, 1987

BEN M. HOGAN COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a jury instruction containing an erroneous presumption with respect to the interstate commerce element of a Sherman Act charge can be a harmless error.

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OPINIONS BELOW

The opinion of the court of appeals on remand from this Court (Pet. App. 31a-36a) is reported at 809 F.2d 480. An earlier opinion of the court of appeals (Pet. App. 1a-27a) is reported at 769 F.2d 1293.

JURISDICTION

The judgment of the court of appeals (Pet. App. 31a) was entered on January 12, 1987. A petition for rehearing was denied on March 30, 1987 (Pet.

App. 37a). The petition for a writ of certiorari was filed on May 29, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Arkansas, petitioner Ben M. Hogan Company, Inc., was convicted of conspiring to fix bids in the award of Arkansas State Highway and Transportation Department highway construction projects in central Arkansas, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Petitioner was fined $800,000 on this count (Pet. App. 1a-2a).[1] The court of appeals reversed on the ground that the jury instructions contained an unlawful conclusive presumption concerning the interstate commerce element of the offense (*id.* at 1a-27a). This Court granted the government's petition for a writ of certiorari, vacated the court of appeals' judgment, and remanded the case for reconsideration in light of *Rose* v. *Clark*, No. 84-1974 (July 2, 1986). *United States* v. *Ben M. Hogan Co.*, No. 85-1067 (July 7, 1986). On remand, the court of appeals affirmed petitioner's Sherman Act conviction (Pet. App. 31a-33a).

1. a. The government's proof of the bid-rigging conspiracy was presented largely through the testimony of the government's principal witness, Leonard Thompson, president of A.P.T. Construction Company

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[1] Petitioner was also convicted on three counts of mail fraud, in violation of 18 U.S.C. 1341, and was fined $1,000 on each count (Pet. App. 2a). These convictions were affirmed by the court of appeals in its original decision in this case (*id.* at 28a-29a), and they were not the subject of further proceedings.

(APT), which was one of the co-conspirators.[2] According to Thompson, in May 1979 William Moore, a vice president of petitioner, asked APT to submit a complementary bid (*i.e.*, a bid intentionally higher than petitioner's)[3] on highway project 60173 (Tr. 18-21 (Thompson)). In exchange, Moore promised to "return the favor" at a later date (*id.* at 21-22). Thompson agreed to Moore's request and submitted a bid that was higher than petitioner's (*id.* at 21, 24-25). Only petitioner and APT submitted bids, and petitioner was awarded the construction job (GX 1).

In July 1980, Thompson in turn asked Moore to submit a complementary bid on highway project 60179, and in September 1980 he asked Moore to submit a complementary bid on project 60234 (Tr. 28-30, 40-41 (Thompson)). Moore agreed to do so (*id.* at 29-30, 40-41). APT was the low bidder on both projects and was awarded the work (*id.* at 30-31, 43-47). See also Pet. App. 3a.

b. The government also proved in three separate ways that the co-conspirators' activities were in or affected interstate commerce. First, unmingled federal revenue sharing funds were used to pay for the three highway projects described by Thompson (2 Tr. 134-140; GXs 1, 4, 7. Second, APT, petitioner's co-conspirator, purchased heavy equipment, including

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[2] APT was charged in the same indictment and with the same offenses as petitioner. Pursuant to a plea agreement, APT entered a guilty plea to the Sherman Act count and to one mail fraud count prior to trial. Pet. App. 2a n.1.

[3] The state encouraged competitive bidding and preferred not to award a contract on the basis of a single bid (Pet. App. 2a n.2). A complementary bid created the appearance of competition where in reality there was none.

pavers, used on these projects that had been manufactured out-of-state and then shipped to Arkansas (2 Tr. 149-151; 3 Tr. 160-162; Tr. 13-14 (Thompson); GXs 14-17). Finally, the rigged projects involved a busy U.S. highway in downtown Little Rock and a state highway in North Little Rock that connects directly to an interstate highway (1 Tr. 76-78; GXs 4, 7, 19).[4]

c. Petitioner's defense at trial was that there was no agreement to rig bids on the highway construction projects (see Pet. App. 4a). Petitioner conceded that Moore and Thompson had spoken about highway projects 60173 and 60234 but denied that they had conspired to rig bids. Defense counsel asserted in his opening and closing statements that Moore solicited a complementary bid from Thompson for the sole purpose of having more than one bid submitted to the state highway department, which preferred to receive more than one bid on a job (1 Tr. 28-29; 6 Tr. 449-450, 457-459; see Pet. App. 2a n.2). Petitioner did not challenge before the jury the sufficiency of the evidence that the co-conspirators' activities were in or affected interstate commerce, nor did petitioner offer any rebuttal evidence on this issue.[5]

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[4] The revenue sharing funds spent on the projects amounted to hundreds of thousands of dollars (GXs 1, 4, 7), and the pavers used on the projects that were purchased in interstate commerce cost over $170,000 (2 Tr. 149-151; 3 Tr. 160-162).

[5] Moreover, petitioner did not argue to the jury in its opening or closing statement that the government had failed to prove the interstate commerce element of the offense (1 Tr. 24-28; 6 Tr. 440-462; R. 223-225, 227-286). Petitioner did raise the sufficiency of the evidence on this issue in a pretrial motion to dismiss the indictment and in motions for a judgment of acquittal. All these motions were denied, and the trial

2. At the conclusion of the trial, the district court instructed the jury concerning the interstate commerce element of a Sherman Act violation. Among other things, the jury was instructed that the government was required to prove beyond a reasonable doubt "that the conspiracy * * * either affected interstate commerce or occurred within the flow of interstate commerce" and that "[t]he Sherman Act is not applicable unless it is first established that there is a restraint or attempted restraint of interstate commerce" (Pet. App. 25a). After instructing the jury on the interstate commerce element of the offense, the court then instructed the jury concerning the type of conduct prohibited by the Sherman Act. Specifically, the court defined conduct that is a per se violation of the Sherman Act by giving the following jury instruction taken from one of the standard manuals (*id.* at 5a (emphasis omitted)):[6]

> Certain types of conduct are regarded as unreasonable per se. This means that the mere doing of the act itself constitutes an unreasonable restraint on interstate commerce, and it is not necessary to consider why the acts were committed, or their effect on the industry, or any other explanatory matter. Conduct regarded as unreasonable per se includes price fixing, division of markets and bid rigging.

Although petitioner had not argued to the jury that the government's proof with respect to interstate

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court told petitioner that it could make its argument on the sufficiency of the evidence to the jury. R. 143-145; 3 Tr. 164, 168; 5 Tr. 367-368.

[6] See La Buy, *Manual on Jury Instructions—Criminal* § 8.01-4, 36 F.R.D. 457, 477 (1965).

commerce was insufficient, petitioner objected to this instruction on the ground that it created an impermissible presumption of an effect on interstate commerce. The district court overruled petitioner's objection. *Id.* at 5a-6a n.5.

3. A divided panel of the court of appeals reversed petitioner's conviction on the Sherman Act count on the ground that the jury instructions contained an unlawful conclusive presumption that the agreement to rig bids affected interstate commerce, in violation of *Sandstrom* v. *Montana*, 442 U.S. 510 (1979) (Pet. App. 5a-9a). The majority observed that if a conclusive presumption concerning an element of an offense could ever be harmless this would clearly be such a case,[7] but the majority concluded that the plurality opinion in *Connecticut* v. *Johnson*, 460 U.S. 73 (1983), required a new trial whenever a jury instruction included a conclusive presumption on an element of the offense (Pet. App. 8a-9a).[8]

4. The government filed a petition for a writ of certiorari, asking that the petition be held and disposed of as appropriate in light of the Court's disposition of *Rose* v. *Clark*, No. 84-1974. After *Rose* v. *Clark* was decided, the Court granted the government's petition, vacated the court of appeals' judg-

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[7] Petitioner did not argue on appeal that the government's proof of the interstate commerce element was insufficient.

[8] Judge Bright dissented (Pet. App. 24a-27a) on the ground that the instructions, read as a whole, were not erroneous. He noted that the instructions fully explained the interstate commerce element and required the jury to find in the government's favor on that issue before considering whether the offense was a per se violation of the Sherman Act (*id.* at 26a-27a).

ment, and remanded the case to the court of appeals for reconsideration in light of *Rose* v. *Clark*. *United States* v. *Ben M. Hogan Co.*, No. 85-1067 (July 7, 1986) (Pet. App. 30a).

5. On remand, a divided court of appeals reinstated petitioner's Sherman Act conviction (Pet. App. 31a-36a). At the outset, the court determined that, under *Rose* v. *Clark*, *supra*, a jury instruction containing an erroneous conclusive presumption with respect to an element of the offense can be harmless in a given case (Pet. App. 32a). The court also concluded that the challenged jury instruction given in this case was harmless for two reasons. First, the trial court's overall instructions required the jury to find that the bid-rigging conspiracy affected interstate commerce before the jury could even consider whether the offense was a per se violation. Second, the government's proof of this element of the crime was "so dispositive" that the jury would have found it unnecessary to rely on the presumption (*ibid.*).[9]

ARGUMENT

Petitioner does not question the court of appeals' finding that the error in this case was in fact harmless beyond a reasonable doubt. Rather, petitioner contends that the court of appeals erred by undertak-

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[9] Judge Bowman dissented (Pet. App. 33a-36a). He argued that *Rose* v. *Clark* is limited to erroneous rebuttable presumptions, and does not reach erroneous conclusive presumptions (Pet. App. 33a-35a) and that the error in this case could not be harmless because the ultimate fact that the government had to prove (*i.e.*, an effect on interstate commerce) did not logically follow from the basic fact that the government did prove (*i.e.*, a bid-rigging conspiracy).

ing to decide this issue. Petitioner argues that the jury instructions contained an erroneous conclusive presumption on an element of the offense and that such a presumption can never be harmless. The court of appeals correctly rejected this argument, and its decision does not conflict with any decision of this Court or of any other court of appeals. In fact, the decision below is consistent with the only other court of appeals decision on this issue. See *United States* v. *Washita Constr. Co.*, 789 F.2d 809, 823 (10th Cir. 1986) (same instruction does not amount to plain error). Accordingly, review by this Court is not warranted.[10]

It is settled law that a jury instruction containing an erroneous presumption does not automatically

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[10] It is not clear that, when the jury instructions in this case are read as a whole (see *United States* v. *Park*, 421 U.S. 658, 674-675 (1975)), there was any error at all. The jury was expressly instructed that "[t]he Sherman Act is not applicable unless it is first established that there is a restraint or attempted restraint of interstate commerce" (Pet. App. 25a). As Judge Bright pointed out in his dissent from the court of appeals' initial decision (*id.* at 24a-27a), the jury was thus correctly and clearly instructed that it first must determine the interstate commerce element of the offense and that it must find a restraint in or affecting interstate commerce *before* considering whether the defendant violated the Sherman Act. In addition, the prosecutor told the jury in his opening and closing statements that the government had to prove the interstate commerce element of the offense, and the prosecutor outlined the evidence adduced on the element (1 Tr. 21-22; 6 Tr. 424-425). In these circumstances, it is reasonable to conclude that the jurors interpreted the challenged portion of the charge as a discussion only of the nature of a per se offense. There is no need to resolve that issue in this case, however, since the court of appeals correctly found that any error on this score was harmless.

require reversal of a conviction. Rather, as long as the issue is not taken away from the jury and a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption, the error may be disregarded as harmless. *Burger* v. *Kemp*, No. 86-5375 (June 26, 1987), slip op. 6 n.5; *Rose* v. *Clark*, slip op. 11-13; see *Pope* v. *Illinois*, No. 85-1973 (May 4, 1987), slip op. 6 & n.7. Here, the court of appeals correctly found that the challenged instruction did not take the issue away from the jury—indeed, "the jury could not even consider the per se instruction unless it had first found that interstate commerce had been affected" (Pet. App. 32a). The jury was also told that it was the sole trier of fact (6 Tr. 470), that the government was required to prove every element of the charged offenses beyond a reasonable doubt (*id.* at 475-476), and that one of the elements of the Sherman Act charge was that the bid-rigging conspiracy was in or affected interstate commerce (*id.* at 484, 491-492; see also Pet. App. 25a (Bright, J., dissenting)). And petitioner has not challenged the court of appeals' finding that the government's proof of the interstate commerce element of the offense was "dispositive" on this point (*id.* at 34a). In these circumstances, the harmless error test articulated by this Court has been satisfied.

Petitioner maintains that this Court's decision in *Rose* v. *Clark*, *supra*, permits harmless error analysis to be applied only to presumptions that are labelled rebuttable, but petitioner has misread that decision.[11]

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[11] Petitioner argues (Pet. 7-8) that an erroneous jury instruction on an essential element of the offense can never be harmless. The Court's recent decision in *Pope* v. *Illinois*,

Although the jury instructions given in that case contained a presumption properly labelled as rebuttable rather than conclusive, the Court did not rest its holding in that case on that distinction. On the contrary, the Court referred apparently interchangeably to jury instructions that were unlawful under *Francis* v. *Franklin*, 471 U.S. 307 (1985), which involved a rebuttable presumption, and jury instructions that were unlawful under *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), which involved a presumption that might have been interpreted as conclusive. *Rose* v. *Clark*, slip op. 1 & n.1, 5 n.5, 9-10 & n.8, 11-12 n.11, 12-13 & n.12; *id.* at 6 (Stevens, J., concurring in the judgment). Cf. *United States* v. *Frady*, 456 U.S. 152, 171-174 (1982) (a defendant who fails to object to a jury instruction containing a conclusive presumption must demonstrate both cause and actual prejudice to obtain habeas corpus relief). The other lower courts have also interpreted the *Rose* v. *Clark* decision to apply to both rebuttable and mandatory presumptions. *E.g.*, *Baker* v. *Montgomery*, 811 F.2d 557, 558 (11th Cir. 1987); *Burton* v. *Foltz*, 810 F.2d 118, 122-123 (6th Cir. 1987); *Bates* v. *Blackburn*, 805 F.2d 569, 578 (5th Cir. 1986).

Petitioner asserts (Pet. 8) that the ruling below conflicts with the decision in *Hoover* v. *Garfield Heights Municipal Court*, 802 F.2d 168 (6th Cir.

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which was handed down after the court of appeals' decision on remand, rejected the argument petitioner advances (slip op. 6 n.7 (citation omitted)) ("To the extent that cases prior to *Rose* may indicate that a conviction can never stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof, * * * after *Rose*, they are no longer good authority.").

1986), but that case is distinguishable.[12] *Hoover* involved a trial court's failure to give any instruction on an essential element of the offense, rather than a jury charge containing an erroneous presumption. The court ruled that the failure to give any instruction could not be harmless under *Rose* v. *Clark*. 802 F.2d at 177-178. Even if the Sixth Circuit would adhere to that ruling today,[13] the decision in that case does not conflict with the decision below. In a subsequent case involving a conclusive presumption, the Sixth Circuit distinguished its decision in *Hoover* as limited to cases where the jury is "precluded from considering" an element of the offense. *Burton* v. *Foltz*, 810 F.2d at 122. In fact, both before and after *Rose* v. *Clark*, the Sixth Circuit has applied the harmless error doctrine to jury instructions containing an

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[12] Petitioner also claims (Pet. 6) that the Eighth Circuit's decision in this case conflicts with its earlier decision in *United States* v. *Voss*, 787 F.2d 393 (1986), cert. denied, No. 86-5398 (Oct. 14, 1986). That claim, even if correct, provides no basis for review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901 (1957). In any event, there is no merit to petitioner's claim. The Eighth Circuit's ruling in *Voss* relied heavily on the original panel decision in this case (787 F.2d at 398-399 & n.4), which was subsequently vacated by this Court. *Voss* also relied on other decisions that were expressly disapproved by this Court in *Rose* v. *Clark* and *Pope* v. *Illinois*. Compare *Voss*, 787 F.2d at 398-399 & n.3 (relying on *Connecticut* v. *Johnson*, 460 U.S. 73 (1983) (plurality opinion), and *Cabana* v. *Bullock*, 474 U.S. 376, 384 (1986)), with *Rose* v. *Clark*, slip op. 11 & n.11 (disapproving *Connecticut* v. *Johnson*, *supra*), and *Pope* v. *Illinois*, slip op. 6 n.7 (disapproving *Cabana* v. *Bullock*, 474 U.S. at 384). Accordingly, there is no conflict between the decision below and *Voss*.

[13] The Sixth Circuit's decision in *Hoover* preceded this Court's decision in *Pope* v. *Illinois*.

erroneous conclusive presumption. *Burton*, 810 F.2d at 123; *Logan* v. *Abshire*, 778 F.2d 283, 284 (1985); *Martin* v. *Foltz*, 773 F.2d 711, 719 (1985); *Charles* v. *Foltz*, 741 F.2d 834, 839 (1984), cert. denied, 469 U.S. 1193 (1985). In these circumstances, there is no conflict warranting review by this Court.[14]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[14] The question presented by petitioner is also unlikely to recur. The court of appeals noted (Pet. App. 9a n.7) that petitioner's claim would be "without substance" if the jury instructions had used the terms "trade" or "commerce," rather than "interstate commerce." In fact, the court of appeals expressly approved the standard jury instruction found at 2 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 55.15, at 405 (3d ed. 1977), which is an instruction frequently used by the government in Sherman Act conspiracy prosecutions. To our knowledge, none of the other instructions used by the Department involve the language challenged here. The question in this case therefore should not arise in the future.

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